IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 772 OF 2004

Suhasini H.Pokade. ... Appellant.

Versus.

Kum.Sunder Gopal Pednekar & ors. ... Respondents.

Shri G.S.Godbole with Shri Rajendra Yadav for the Appellant.

Smt.Vijaylaxmi Sarjerao Nikam for the Respondent No.1.

Mrs.Geeta Mulekar, A.G.P. for Respondent No.3.

CORAM : ABHAY S. OKA, J.

DATED : 15th March, 2005.

P.C.:

1. By order dated 22nd February 2005 parties were put to notice that the Appeal may be decided finally at admission stage. Accordingly today I have heard the appeal finally. Perused the record of the City Civil Court.

2. This appeal is preferred by the Appellant/Plaintiff for challenging the judgment and order dated 16th July 2004. By the said order Notice of Motion taken out by the Appellant/Plaintiff for restoration of the suit has been dismissed.

3. On 3rd February 2004 the suit was dismissed for default. Shri Godbole appearing for the Appellant submitted that on 29th January 2004 time to carry out

the amendment to the plaint was extended as last chance by a period of 8 days. The said period was to expire on 6th February 2004. He pointed out from the record of the City Civil Court that in fact the amendment to the plaint was carried out on 30th January 2004 and on the same day the plaint was reverified. He submitted that time was available to serve a copy of the amended plaint till 6th February 2004 and therefore, on 3rd February 2004 the learned trial Judge could not have recorded a finding that the direction dated 29th January 2004 is not complied with. He therefore submitted that on 3rd February 2004 the suit could not have been dismissed for default.

4. The learned Counsel appearing for the Respondent No.1 has strongly opposed the submissions made by the learned Counsel appearing for the Appellant. She submitted that the suit filed by the Appellant was itself not maintainable. She submitted that though in the Notice of Motion taken out for restoration of the suit it is tried to be contended that the Appellant was sick. no medical certificate has been produced along with the Notice of Motion. She submitted that even a certificate was not produced at the time of hearing of the Notice of Motion. The learned Counsel further submitted that the suit is not dismissed only because the amendment is not carried out, but it is dismissed as the witnesses of the Appellant were absent. She has

pointed out the Roznama of the suit which according to her indicates that the Appellant has been repeatedly seeking adjournments. She submitted that though issues have been framed in the year 2002, the Appellant has delayed the hearing of the suit by adopting one method or the other. She therefore submitted that the Appeal should be dismissed and no indulgence should be shown to the Appellant.

5. A perusal of the order dated 3rd February 2004 passed by the trial Court shows that the suit is dismissed essentially on the ground that the Appellant did not comply with the direction dated 29th January 2004. While dismissing the suit the learned trial Judge has noted that the Plaintiff's witnesses were absent and the order appointing Court Commissioner for recording evidence of the Appellant has not been complied with. It will be necessary to refer to the order dated 29th January 2004. By the said order time to carry out the amendment was extended by a period of 8 days. The said time was to expire on 6th February 2004. The original record of the City Civil Court which is produced before me shows that the amendment was carried out on 30th January 2004 and the plaint was reverified before the concerned Officer of the City Civil Court. Thus time upto 6th February 2004 was available to the Appellant to serve a copy of the amended plaint on the Defendant. Therefore, on 3rd February 2004 i.e. before expiry of

the period fixed by the order dated 29th January 2004, the learned trial Judge could not have found fault with the Appellant for not complying with the order dated 29th January 2004.

6. On 3rd February 2004 there was no occasion for examining the witnesses of the Appellant as examination of the Appellant on commission was yet to be recorded. As per the provisions of Order XVIII of the Code of Civil Procedure, 1908 the witnesses of the Appellant/ Plaintiff could not have been examined before the examination of the Appellant was completed. Therefore, the suit could not have been dismissed for default on the ground that the witness of the Appellant were absent.

7. In so far as the submissions made by the learned Counsel for the Respondent No.1 on merits of the suit are concerned, I am not considering the same. In this Appeal from order I am concerned with the legality and validity of the impugned Judgment and order by which the prayer made by the Appellant for restoration of the suit has been dismissed. In so far as the issue regarding maintainability of the suit is concerned, the same will have to be argued before the Court before which the suit is pending and the submission is beyond the scope of this appeal.

8. Shri Godbole appearing for the Appellant submitted that the Appellant is ready and willing to file an affidavit of examination-in-chief so that she can be cross-examined by the Respondents before the Court Commissioner who is already appointed. Shri Godbole states that the Appellant wants to examine two more witnesses apart from the Appellant. If Roznama of the suit is perused there is some substance in the contention raised by the learned Counsel for the Respondent No.1 that the Appellant has not prosecuted the suit diligently. Though a case for restoration of the suit is made out, the Respondent No.1 will have to be compensated by adequate costs. Moreover the Appellant will have to be put to terms considering the fact that the suit is of the year 1985. The Appellant cannot be allowed to seek adjournment on unreasonable ground.

9. Considering the fact that the suit is of the year 1985 and the Appellant/Plaintiff has taken unreasonably longer time to carry out the amendment, costs will have to be imposed quantified at Rs.7500/-. Since the suit is of the year 1985, I was inclined to direct that the suit should be disposed in a time bound manner and I was inclined to direct the Appellant to file affidavit of examination-in-chief before the trial Court in time fixed by this Court. However, the learned Counsel for the Respondent No.1 submitted that before the affidavit

of examination-in-chief is filed by the Appellant, the Respondent No.1 wants to agitate the issue of maintainability of the suit. Hence I am not fixing any time limit for filing affidavit of examination-in-chief.

10. Hence the following order is passed:

(i) The impugned Judgment and Order dated 16th July 2004 is quashed and set aside. The Notice of Motion No.736 of 2004 is made absolute subject to condition of the Appellant paying a sum of Rs.7500/- by way of costs to the Respondent No.1 within a period of four weeks from today. If the amount of costs is not accepted, the Appellant will deposit the said amount in the trial Court within the stipulated time. If the amount of cost is not paid or deposited within the stipulated time, the order of dismissal of the suit will stand.

(ii) It will be open for the Respondent No.1 to agitate the issue regarding maintainability of the suit in accordance with law.

(iii) The parties will appear before the learned trial Judge on 25th April 2005. The learned Counsel for the Respondent No.1 states that the date fixed is convenient to the Respondent No.1.

(iv) The Appellant will not seek adjournment on any unreasonable ground and will cooperate with the trial Court for early disposal of the suit.

(v) The learned trial Judge will decide the suit as expeditiously as possible and in any event on or before 31st March 2006. All contentions of the parties on merits are expressly kept open.

(v) The parties and the concerned Court will act on authenticated copy of the order.

Judge.